UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 05-3621

WAYNE BERRIER; BRENDA GREGG, in their own right and as parents and natural guardians of Ashley Berrier, a minor,

Appellants

v.

SIMPLICITY MANUFACTURING, INC.,

Third-Party Plaintiff

v.

SUSIE SHOFF; MELVIN SHOFF,

Third-Party Defendants

Appeal from the United States District Court
for The Eastern District of Pennsylvania
Civil Action No. 04-cv-00097
District Court: The Honorable Legrome D. Davis

Argued January 8, 2007

Before: McKEE, AMBRO, and FISHER,
Circuit Judges

CERTIFICATION OF QUESTION OF LAW

This matter came before the United States Court of Appeals for the Third Circuit, on

appeal from a final judgment of the United States District Court for the Eastern District of Pennsylvania, granting summary judgment in favor of defendant Simplicity Corporation, Inc. on plaintiffs' strict-liability claim under § 402A Restatement (Second) Torts as well as claims for negligence. *See Berrier v. Simplicity Corp.*, 413 F.Supp.2d 431 (E.D. Pa. 2005).

The panel, (McKee, Ambro, and Fisher, JJ.), having read the briefs and submissions of the parties, having heard oral argument, and having reviewed applicable cases of the Pennsylvania Supreme and Superior Courts, believes the appeal raises important and unresolved questions concerning the permissible scope of bystander recovery for products liability claims under Pennsylvania law. The panel unanimously agreed to certify this question to the Pennsylvania Supreme Court by way of the certification procedure outlined in 3rd Cir. LAR Misc. 110 and Internal Operating Procedures 10.9. Accordingly, we respectfully request that the Pennsylvania Supreme Court accept this certification.

I. Background

The parties do not dispute the following background facts:

(a) On May 7, 2003, Ashley Berrier, who was then four years old, was at her grandparents' house in Honeybrook, Pennsylvania. Her grandfather, Melvin Shoff, was mowing his lawn with a riding mower manufactured by the defendant, which Shoff had purchased new in 1994. While Shoff was mowing the lawn, Ashley entered the yard, and Shoff inadvertently backed the mower over Ashley's foot. The foot was ultimately amputated as a result of the accident.

(b) The mower was designed between 1991 and 1994 and manufactured by defendant Simplicity Manufacturing, Inc. on October 19, 1994. The mower contains a 36" steel mower deck enclosing two rotating mower blades. The deck is positioned between the front and rear wheels surrounding the perimeter of the blades. The operator can control the engagement of the blades by way of a power take-off lever on the side of the dashboard, as well as the speed and direction of the tractor. The operator's vision is not impeded by any physical barriers when the operator is properly seated on the mower. The mower was not equipped with any mechanism to prevent the blades from being powered by the motor when it went into reverse, nor was the deck of the mower outfitted with any physical barrier that would prevent a "foreign object" from being run over and struck by the rotating blades when it is put into reverse.

(c) At the operator's position on the mower several warnings are posted, including the following: (I) DO NOT MOW WHEN CHILDREN OR OTHERS ARE AROUND; (ii) NEVER CARRY CHILDREN; (iii) LOOK DOWN AND BEHIND BEFORE AND WHILE BACKING. The Operator's Manual contains further warnings including the following:

> (I) Tragic accidents can occur if the operator is not alert to the presence of children. Children are often attracted to the unit and the mowing activity. Never assume that children will remain where you last saw them.
>
> (ii) Keep children out of the mowing area and under the watchful care of another responsible adult.
>
> (iii) Be alert and turn unit off if children enter the area.
>
> (iv) Before and when backing, look behind and down for small children.

Ashley's parents sued Simplicity on their own behalf, and as parents and guardians of Ashley, in the Court of Common Pleas of Philadelphia County, Pennsylvania. The complaint contained two counts - a strict products liability claim and a negligence claim - both based on Pennsylvania law. Both claims allege that the design of, and warnings on, the mower were defective. Plaintiffs allege that the design of the mower is defective because it did not contain safety devices, such as a "no-mow-in-reverse" device or a physical barrier such as roller barriers. Plaintiffs argue that such mechanisms and devices would eliminate "back-over" accidents such as the one that injured Ashley. On the basis of diversity, defendant removed the suit to the United States District Court for the Eastern District of Pennsylvania.

Thereafter, Simplicity moved for summary judgment on both claims, and the district court granted the motion in its entirety. *Berrier v. Simplicity Corp.*, 413 F. Supp. 2d 431 (2005).

II. Legal Background

In denying Plaintiffs' claim for strict liability, the district court held that Ashley could not recover under Pennsylvania law because she was not an "intended" user of the mower.[1] In doing so, the district court relied heavily on *Phillips v. Cricket Lighters*, 841 A.2d 1000

[1] Because the district court found that the intended user doctrine prohibited recovery, it "[did] not resolve Simplicity's alternative argument that the mower was not 'unreasonably dangerous' because plaintiffs failed to provide evidence of a safer, alternative design." *Id.* at 443 n.5.

(Pa. 2003). There, a two-year-old child used a butane cigarette lighter to start a fire that subsequently consumed his apartment, killing him along with his mother and another child. *Id.* at 1003. The administratrix of their estates brought a strict liability claim against the manufacturers and distributors of the lighter, alleging its design was defective because it lacked any child-resistant features. *Id.* The Supreme Court held that the "intended use" doctrine, as developed in Pennsylvania, precluded recovery in strict liability. Then Chief Justice Cappy, writing for the majority, emphasized that under Pennsylvania law "negligence concepts have no place in strict liability law." *Id.* at 1007. Accordingly, to establish a strict liability claim for a defective design, "the plaintiff must establish that the product was unsafe for its intended user[.]" The Court explicitly "state[d] that a manufacturer will not be held strictly liable for failing to design a product that was safe for use by any reasonably foreseeable user[,] as such a standard would improperly import negligence concepts into strict liability law." *Id.*

Here, the district court reasoned that "[t]o recognize a blanket innocent bystander exception, so that a manufacturer must make a product safe for its intended user and all bystanders in proximity to the product during its application, would eviscerate the holding of the *Phillips* Court and its underlying rationale." *Berrier*, 413 F. Supp. 2d at 442. The court explained further that, "because Ashley was an innocent bystander, rather than an intended user or consumer, and because plaintiffs have introduced no evidence to suggest that the mower was unsafe for its intended user, plaintiffs may not recover against Simplicity

under Pennsylvania law for injuries Ashley sustained as a result of the alleged defect in the mower." *Id.* at 443.

Plaintiffs have appealed, arguing that the district court erred and that the "intended use" and "intended user" doctrines should not bar recovery for bystanders such as Ashley. Rather, they claim the mower was being used as intended by an intended user when Ashley's injury occurred. They further contend that the holding of *Phillips* and related cases was not meant to foreclose the right of bystanders to recover under strict liability, a right they claim has been either implicitly or explicitly recognized in various cases interpreting Pennsylvania law. *See Salvador v. Atlantic Steel Boiler* Co., 319 A.2d 903 (Pa. 1974); *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 319 A.2d 914 (Pa. 1974); *Pegg v. General Motors*, 391 A.2d 1074 (Pa. Super. 1978). *See also Stratos v. Super Sagless Corp.*, 1994 WL 709375 (E.D. Pa. 1994); *Fedorchick v. Massey-Ferguson, Inc.*, 438 F.Supp. 60 (E.D. Pa. 1977), *aff'd*, 577 F.2d 725 (3d Cir. 1978).

In *Phillips*, three Justices concurred in the result under then-current Pennsylvania law, but noted that they would prospectively adopt the formulation of product liability set forth in the Third Restatement of Torts. 841 A.2d at 1019 (Saylor J., concurring). Under the Third Restatement, a design defect exists "when the *foreseeable risks of harm* posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor . . . and the omission of the alternative design renders the product not reasonably safe." Restatement (Third) of Torts: Product Liability § 2 (1998) (emphasis

added).

Subsequent to the district court's decision in this case, the Pennsylvania Supreme Court decided *Pennsylvania Department of General Services v. United States Mineral Products Co.*, 898 A.2d 590 (2006) (hereinafter "*Mineral Products*"). Justice Saylor authored the opinion and cited *Phillips* for the proposition that in strict liability actions "a manufacturer can be deemed [strictly] liable only for harm that occurs in connection with a product's intended use by an intended user. . . ." *Id.* at 600. The majority in *Mineral Products* declined to recognize a "conditions-of-use" exception to the bar against resort to negligence-based precepts within the strict liability scheme. The majority explained that recognition of such an exception would "contravene[] the strong admonition of the lead opinion in *Phillips* (echoing prior decisions of the Court) to the effect that foreseeability considerations have no place in [strict liability], as well as the position of the three-Justice concurrence that, given the conclusion of those Justices that there are substantial deficiencies in present strict liability doctrine, it should be closely limited pending an overhaul by the Court." *Mineral Products*, 898 A.2d at 601 (internal citations omitted).

The district court also believed that the Superior Court's decision in *Riley v. Warren Manufacturing*, 688 A2d. 221 (Pa. Super. 1997) counsels against Plaintiffs right to recover here. However, it is not clear whether *Riley* affords proper guidance in this area, as it has never been cited by the Pennsylvania Supreme Court.

III. Conclusion

In light of the foregoing cases, we are persuaded that the proper scope of strict liability remains unresolved where a bystander, who is neither a "user" nor a "consumer" of an allegedly defective product, is injured when that product is being used as intended. Inasmuch as the question is an important "social policy determination," *Fitzpatrick v. Madonna*, 623 A.2d 322, 324 (Pa. Super. 1993), that remains unresolved in Pennsylvania, NOW THEREFORE, the following question of law is certified to the Supreme Court of Pennsylvania for disposition according to the rules of that Court:

> Whether, under Pennsylvania law a plaintiff minor child may pursue a strict liability claim for injuries caused by a riding lawnmower, where that child is neither an intended user nor consumer of the mower. *See Pennsylvania Department of General Services v. United States Mineral Products Co.*, 898 A.2d 590 (Pa. 2006)*; Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003); *Riley v. Warren Manufacturing*, 688 A.2d 221 (Pa. Super. 1997).

This Court shall retain jurisdiction of the appeal pending resolution of this certification.

BY THE COURT:

Theodore A. McKee
Circuit Judge

DATED: 17 January 2008